

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 20, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1470-CR

Cir. Ct. No. 2016CF91

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSICA R. TOWNSEND,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
LAMONT K. JACOBSON, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Jessica Townsend appeals a judgment convicting her of fourth-offense operating a motor vehicle while intoxicated. She contends the arresting officer lacked legal justification to stop her vehicle and, therefore, the circuit court erred when it denied her motion to suppress evidence of her intoxication. Because we conclude the officer had sufficient reasonable suspicion

that the driver was operating the vehicle while intoxicated, we affirm the judgment.¹

¶2 At the suppression hearing, officer Mitchell Klieforth described the circumstances that led to his decision to stop Townsend's vehicle. Klieforth was in the left of two lanes traveling southbound on a four-lane, interstate highway when he observed Townsend's vehicle in the right lane, approximately thirty yards in front of him. Three other vehicles somewhat blocked his view of Townsend's vehicle. Klieforth testified that Townsend's vehicle drifted to the shoulder of the road and then back more than three times in a two-minute, approximately two-mile, span.² He could not tell whether she drifted over the fog line, and he did not hear the rumble strips on the shoulder. Klieforth decided to stop Townsend's vehicle after "another car was going to pass her and then backed off which appeared to be due to her driving behavior." After Townsend was stopped, she told Klieforth her brakes needed repair because her vehicle pulled to the right when she used her brakes. However, there was no indication that she used her brakes during the time Klieforth observed her swerving in her lane. A subsequent blood test showed Townsend's blood alcohol level at 0.086, more than four times the legal limit applicable to Townsend.

¹ The judgment was entered/ by Judge Lamont Jacobson. The order denying the motion to suppress was heard and decided by Judge Jill Falstad.

² On appeal, Townsend argues the circuit court made an erroneous finding of fact by stating that Klieforth testified that, "it looked like [Ms. Townsend's] vehicle went *onto* the shoulder." (Emphasis added.) For purposes of our decision, we do not rely on any factual finding that Townsend's vehicle actually went onto the shoulder of the interstate or even touched the fog line. Rather, we rely on Klieforth's testimony that Townsend's vehicle drifted *to* the shoulder of the road and then back more than three times.

¶3 A traffic stop must be justified by either probable cause or reasonable suspicion. *State v. Popke*, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569. Reasonable suspicion must be grounded in specific articulable facts and not an inchoate, unparticularized suspicion or a hunch. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

¶4 Townsend contends Klieforth lacked sufficient justification for stopping her vehicle. She relies primarily on *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634, which rejected the State’s proffered bright-line rule to allow an investigatory stop in cases where a motorist is weaving within his/her lane. The State’s proposed rule would have allowed a traffic stop even when the drifting within the lane was minimal or happened very few times over a great distance. *Id.*, ¶19. However, the court also noted that driving need not be illegal, erratic or unsafe to give rise to a reasonable suspicion. *Id.*, ¶24. The court applied a “totality of the circumstances” test for determining reasonable suspicion. *Id.*, ¶26.

¶5 We conclude Klieforth had sufficient reasonable suspicion to stop Townsend’s vehicle. Although he could not see whether she left her lane of travel, he observed her weaving within her lane at least four times in a two-minute span and causing other drivers to be afraid to pass her because of her erratic driving. *Id.*, ¶25 (noting courts have considered “pronounced or prolonged weaving” and “other suspicious aspects of driving” when determining whether reasonable suspicion exists).

¶6 Townsend argues the presence of a marked squad car and not her driving might have been the reason for the other driver’s aborted attempt to pass her. However, an officer forming a reasonable suspicion is not required to first

rule out the possibility that there was an innocent explanation for the other driver's behavior. *See State v. Nieves*, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125 (police not required to rule out innocent explanations when reasonable inference supports reasonable suspicion).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited except as provided under RULE 809.23(3) (2015-16).

